

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JUAN E. MANZUR,

Case No. 3:16-cv-00650-MMD-WGC

Petitioner,

ORDER

v.

BACA, *et al.*,

Respondents.

This habeas matter comes before the Court for initial review under Rule 4 of the Rules Governing Section 2254 Cases and on petitioner's motion to delay action. (ECF No. 4.) Following upon initial review, the Court finds that the petition must be dismissed without prejudice as a successive petition, without further delay.

I. BACKGROUND

Petitioner seeks to challenge the duration of his custody under his April 6, 2004, Nevada state conviction, pursuant to a guilty plea, of first-degree kidnapping; battery with the use of a deadly weapon with substantial bodily harm; battery with substantial bodily harm; assault with a deadly weapon; discharging a firearm at or into a structure, vehicle, aircraft or watercraft; two counts of coercion; and two counts of child abuse and neglect.

Petitioner filed a federal petition in this Court challenging the same conviction in Case No. 2:07-cv-00384-JCM-RJJ. The Court denied that petition as untimely; and the Court of Appeals denied a certificate of appealability in No. 10-15444 in that court.

1 Petitioner filed a second federal petition pertaining to the conviction in 3:16-cv-
2 00571-MMD-VPC. The Court dismissed that action without prejudice because petitioner
3 had not properly commenced the action by either paying the filing fee or submitting a
4 properly completed application to proceed *in forma pauperis*. The dismissal order further
5 stated:

6 In addition, the Court notes that petitioner appears to have a previous case
7 under 28 U.S.C. § 2254 with respect to the conviction challenged in this
8 newly-submitted petition: *Manzur v. Williams*, 2:07-cv-00384-JCM-RJJ. In
9 that proceeding, the court dismissed the petition with prejudice based on
10 a finding it was untimely-filed. (ECF No. 32, 2:07-cv-00384-JCM-RJJ.) If
11 that is the case, petitioner is advised that 28 U.S.C. § 2244(b) requires him
12 to obtain leave from the appropriate court of appeals before filing a second
13 or successive petition in the district court. *See McNabb v. Yates*, 576 F.3d
14 1028, 1030 (9th Cir. 2009) (holding that the dismissal of a federal petition
15 on the ground of untimeliness is a determination “on the merits” for
16 purposes of § 2244(b)).

17 Case No. 3:16-cv-00571-MMD-VPC, ECF No. 2 at 2.

18 Review of the Ninth Circuit’s online docket records reflects that petitioner filed an
19 application for permission to file a second or successive petition in the Ninth Circuit on
20 October 28, 2016, under No. 16-73472.

21 On or about October 30, 2016, without first actually having obtained permission
22 from the Ninth Circuit to file a second or successive petition, petitioner mailed another
23 habeas petition to the Clerk of this Court, which was filed under Case No. 3:16-cv-
24 00630-MMD-VPC. The Court dismissed that petition as a successive petition on
25 November 9, 2016.

26 On or after October 31, 2016, also without first having obtained permission to file
27 a second or successive petition, petitioner mailed the present habeas petition to the
28 Clerk.

 On or about November 11, 2016, petitioner mailed for filing a motion to delay
action on the present petition until after the Ninth Circuit has acted on his application for
permission to file a second or successive petition. He asserts that, absent such delay, a

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1 decision in this case likely would be the “same as the decision . . . in . . . 3:16-cv-00630.”
2 ECF No. 4.

3 Petitioner indisputably did not obtain permission from the Court of Appeals prior
4 to the filing of this action as required by § 2244(b)(3)(A). Nor had such permission been
5 granted as of this Court’s most recent review of the appellate court’s online docket
6 record.

7 Review of the online docket record of the state district court confirms that there
8 has been no intervening amended or corrected judgment filed since the time of the April
9 6, 2004, original judgment of conviction.

10 **II. DISCUSSION**

11 Under 28 U.S.C. § 2244(b)(3), before a second or successive petition is filed in
12 the district court, the petitioner must move in the court of appeals for an order authorizing
13 the district court to consider the petition. A federal district court does not have jurisdiction
14 to entertain a successive petition absent such permission. If an earlier federal petition is
15 dismissed as untimely, a subsequent petition challenging the same judgment of
16 conviction or sentence will constitute a second or successive petition. *See, e.g., McNabb*
17 *v. Yates*, 576 F.3d 1028 (9th Cir. 2009).

18 There is no dispute that the present petition is a successive petition, and
19 petitioner clearly was aware of the successive nature of the petition when he filed it. In
20 the present petition, petitioner challenges the duration of his custody under the same
21 judgment of conviction that he previously challenged in Case No. 2:07-cv-00384. That
22 prior petition was dismissed with prejudice as untimely. There has been no intervening
23 judgment in the state district court. Petitioner has applied for — but did not first obtained
24 — permission from the Court of Appeals to pursue a successive petition. The petition
25 therefore is subject to immediate dismissal for lack of jurisdiction as a successive
26 petition.

27 Petitioner has presented no valid reason for delaying dismissal of this action.
28 Petitioner indicates that he is seeking to avoid the same result as in Case No. 3:16-cv-

1 00630, a dismissal. However, petitioner's assertion in this regard merely highlights that
2 he has filed multiple admittedly successive actions in this Court in a vain effort to achieve
3 a different result.

4 Dismissal of this action without prejudice will not materially impact an analysis of
5 the application of the federal one-year limitation period in a later action even in the event
6 that the Court of Appeals were to grant petitioner permission to pursue a successive
7 petition. The federal limitation period expired over a decade ago on May 6, 2005. (See
8 Case No. 2:07-cv-00384, ECF No. 32 at 3-4.) Petitioner's claims in this action are based
9 on alleged errors in a pre-sentence investigation report filed in the state district court,
10 also over a decade ago, based on alleged personal facts that clearly would have been
11 known to petitioner at the time. Even petitioner's fanciful allegations as to the alleged
12 reasons why he did not present such facts at the time would not explain the failure to do
13 so for the intervening twelve years. There is no reasonable prospect that the filing date
14 of the present petition would be material to an analysis of the application of the federal
15 limitation period in a later action.

16 This action, therefore, will be dismissed without further delay. If petitioner
17 continues to file successive petitions in this Court without first *obtaining* permission to
18 pursue a successive petition, he may be subjected to sanctions and/or designation as a
19 restricted filer.

20 **III. CONCLUSION**

21 It is therefore ordered that the petition will be dismissed without prejudice for lack
22 of jurisdiction as a successive petition.

23 It is further ordered that petitioner's motion to delay action (ECF No. 4) is denied.


24 It is further ordered that a certificate of appealability is denied, as jurists of reason
25 would not find the Court's dismissal without prejudice on procedural grounds to be
26 debatable or incorrect, for the reasons discussed herein.

27 It is further ordered, pursuant to Rule 4 of the Rules Governing Section 2254
28 Cases, that the Clerk of Court will make informal electronic service upon respondents

1 by adding Nevada Attorney General Adam P. Laxalt as counsel for respondents and
2 directing a notice of electronic filing of this order to his office. No response is required
3 from respondents other than to respond to any orders of a reviewing court.

4 The Clerk will enter final judgment accordingly, dismissing this action without
5 prejudice.

6 DATED THIS 15th day of December 2016.

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9 MIRANDA M. DU
UNITED STATES DISTRICT JUDGE